

Chapter 7

Making regional economic community laws enforceable in national legal systems – constitutional and judicial challenges

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1. Introduction

A principal challenge in regional economic integration is how to make community laws legally binding and enforceable within national legal systems. Community laws take the form of treaties, protocols, regulations, decisions, principles, objectives and general undertakings.^[1] I characterise this challenge as one of law translation. The absence of law translation creates a disjunction between the community and national legal systems. It leads to the alienation of natural and legal persons from the economic integration processes and their benefits. Generally, it undermines the effectiveness of economic integration. Law translation enhances the effectiveness of regional economic integration processes. It decentralises the community law enforcement machinery and makes it accessible to residents of the economic community. Decentralisation reduces the burden on the community's institutional structures set up to monitor and seek redress for violations of community laws.

Law translation encompasses all processes and principles that render international law capable of enforcement or application within national legal systems. Examples of these are national incorporation of international law, use of foreign laws as aids to construction, use of foreign laws as the applicable law under the rules of private international law, and taking judicial notice of foreign laws.

A number of factors influence the extent to which community laws can be effectively translated within national legal systems. They include national constitutions, judicial philosophy which informs judgments, legal culture and public awareness. Drawing on materials from Eastern, Southern and Western African states and economic integration processes in these regions, this paper comparatively explores from constitutional and case-law perspectives how law translation is approached in

^[1] In this paper, a broad definition is given to the concept of law. It encompasses values, goals and objects of the community. These may not be positive laws properly so called, but are treated as such here because they can produce legal effects.

Africa's economic integration processes. It focuses on how the treaties establishing the Economic Community of West African States (ECOWAS), Common Market of Eastern and Southern Africa (COMESA), East African Community (EAC), national constitutions and judicial philosophy deal with law translation.^[2]

The paper argues that on the whole the regional economic community treaties, national constitutions and case-law are not conducive to facilitating the translation of community laws into legally binding and enforceable national laws. It suggests that other processes and principles of law translation can be used to make community laws legally relevant for individuals at the national level. It further suggests that, to strengthen Africa's economic integration, there is the need to rethink national constitutional laws, and the judicial philosophy which informs the determination of cases in which community issues are involved.

2. Community treaties and law translation

2.1 Community principles for law translation

2.1.1 Introduction

The constitutive treaties of regional economic communities often contain provisions aimed at defining the relations between community and national law. This is done to make community law effective in national legal systems. This section examines some of these provisions. In a sense, the issues arising here are part of the broader question of the place of international law in national legal systems. After all, community law is a special breed of international law. In the absence of community treaty provisions which define how community laws can be effective in national legal systems, one must look for answers in national constitutions and jurisprudence.

Indeed, even where the community treaties define the place of community law in national legal systems,^[3] one still has to look to national constitutions and jurisprudence to determine whether the approach adopted by the treaties can be accommodated by national legal systems. This is because states are sovereign and,

^[2] Occasionally, reference will also be made to the Southern African Development Community (SADC).

^[3] See e.g. Treaty establishing the European Community (EC Treaty), article 249. It provides 'a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.'

for the ‘intrusion’ of foreign laws into their legal systems to be accommodated, the sovereign’s imprimatur is necessary.

2.1.2 The principle of direct applicability of community law

The principle of direct applicability allows community law to become part of national legal systems without intervening national measures which aim at transforming the community law into a national one. The European Court of Justice defines the principle to mean that the entry into force of community law is ‘independent of any measure of reception into national law’.^[4] The measure could be a parliamentary resolution, an act of parliament, or an executive act such as cabinet approval.^[5] The character of the measure often determines the domestic effect or status of the relevant international law. In general, and especially in common law countries, an act of parliament is required before international law^[6] becomes enforceable;^[7] mere ratification by parliament will not be enough.^[8]

Direct applicability maintains the specificity of community laws within national legal systems. Their character as community laws is not obscured by their transformation into national laws. This renders issues involving community law relatively more visible. Direct applicability also circumvents a consequence of the traditional international law modes for giving effect to international law in national legal systems, namely, subjecting the translated international law to national laws on the hierarchy of laws. Within a national hierarchy of laws, conflict of laws are resolved using national rules such as the *lex posterior derogate priori* rule. In economic integration, the application of this rule to community law upsets the vertical relations between

^[5] See e.g. Uganda: Ratification of Treaties Act 1998, Chapter 204, Section 2(a) which allows cabinet to ratify defined treaties without resort to parliament. See also Constitution of the Republic of South Africa, Article 231(3).

^[6] Customary international law is often treated differently. Subject to proof that it exists, it is automatically considered part of national legal systems. See Constitution of the Republic of South Africa, Article 232; Constitution of the Republic of Malawi, Article 211(3); Constitution of the Republic of Namibia, Article 144. In common law, customary international law is deemed part of the national legal system. Community law is principally treaty based; therefore, it is unlikely to benefit from this treatment of customary international law.

^[7] See e.g. Constitution of the Republic of South Africa, Article 231(4). It provides that ‘an international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’.

^[8] See e.g. Constitution of the Republic of Malawi, Article 211(1). It provides that ‘any international agreement ratified by an Act of Parliament shall form part of the law of the Republic *if so provided for in the Act of Parliament ratifying the agreement*’.

community and national legal systems, hinders the uniform application of community law within the member states' legal systems, and generally makes community law ineffective.

This is illustrated in the South African case of *Moolla Group Ltd. v Commissioner for SARS* (2003).^[9] The case involved a conflict between a South African statute incorporating a bilateral trade agreement between South Africa and Malawi and the bilateral agreement itself. It was held that in cases of such conflict, the national legislation should prevail. In the words of the court: 'If there were to be an apparent conflict between general provisions of the statute and particular provisions of an agreement, difficulties of interpretation might indeed arise. *The Act must, of course, prevail in such a case: the agreement once promulgated is by definition part of the Act.*'^[10] The dictum seems to wrongly suggest that, by incorporation, an international instrument loses its independent existence.^[11] It shows a danger inherent in 'nationalising' international agreements absent the principle of direct applicability.

Although some regional economic integration treaties provide for direct applicability of community law,^[12] none of the African regional communities examined here provide for it. This does not imply that the importance of the principle in ensuring the effectiveness of community law is not appreciated in Africa. Indeed, in his commentary on the Draft Treaty establishing the East African Community, Mvungi (2002:89) advocated the introduction of a provision to make for the 'direct application of community law and decisions in the domestic jurisdiction of the Partner States'. Unfortunately, this call was not heeded by the drafters of the EAC Treaty. Rather, the community treaties leave it to member states to resort to their respective constitutional procedures to give effect to community law.^[14] For example, under Article 5(2) of the COMESA Treaty:

^[9] Case No 139/20002 (26 March 2003). For a critical comment on the case, see Erasmus (2003:157).

^[10] Case No 139/20002 (26 March 2003) at [15].

^[11] Compare *Peter Anyang' Nyong'o v. Attorney General* (2007:9) where the Kenya court held that the fact that the Treaty establishing the East African Community has been given the force of law though the Treaty establishing the East African Community Act did not make the treaty lose its 'independent existence'.

^[12] See e.g. EC Treaty, Article 249; EEA Agreement, Article 7(a).

^[14] See EAC Treaty, Article 8(2); COMESA Treaty, Article 5(2); ECOWAS Treaty, Article 5(2); SADC Treaty, Article 6(5).

Each Member State shall take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular: ...

(b) to confer upon the regulations of the Council the force of law and the necessary legal effect within its territory.

This provision, which has neither a defined time frame for the legislation to be enacted nor a sanction for non-compliance is susceptible to breach.^[15] To my knowledge, it is only within the East African Community that all the founding member states have enacted legislation giving ‘the force of law’ to ‘the provisions of any Act of the Community ... from the date of the publication of the Act in the Gazette’.^[16] It appears the other regional economic community member states have been remarkably coy about giving the force of law to community laws in their national legal systems. For example, Bethlehem (2005:434) notes that ‘in most instances, the trade, financial and economic agreements to which South Africa is a party have not been enacted into municipal law’. This does not deny the fact that specific provisions in national legislation may be informed by aspects of community law even if not expressly so stated in the legislation.

It must be pointed out that there are provisions in the community treaties that may be interpreted as implying the direct applicability of community law. Article 9(6) of the ECOWAS Treaty provides that decisions of the Authority of Heads of State and Government ‘shall automatically enter into force sixty days after the date of their publication in the Official Journal of the Community’.^[18] Almost identical provisions are contained in the EAC^[19] and COMESA treaties.^[20] In the light of the fact that the

^[15] Compare EAC Treaty, Article 8(2). It provides that ‘each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular ...

(b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory’.

^[16] See Kenya: Treaty for the Establishment of East African Community Act 2000, Article 8(1); Uganda: East African Community Act 2002; and Tanzania: Treaty for the Establishment of East African Community Act 2001.

^[18] The same rule applies to regulations adopted by the Council of Ministers. See ECOWAS Treaty, Article 12(4).

^[19] Article 14(5): ‘...the Council of Ministers shall cause all regulations and directives made or given by it under this Treaty to be published in the Gazette, and such regulations or directives shall come into force on the date of publication unless otherwise provided therein’.

treaties already envisage the use of national constitutional procedures to give the 'force of law' to community law, it can hardly be argued that these provisions were meant to enshrine the principle of direct applicability.^[21] Indeed, a cursory reading of Article 10 of the COMESA Treaty, which was obviously borrowed from Article 249 of the EC Treaty, reveals that the phrase 'directly applicable' was deliberately omitted.^[22]

The reliance on national constitutional measures to give effect to community law is one of the principal reasons for the failure of Africa's economic integration process, at least to the extent that the presence of the communities is not immediately felt at the national level. The approach is too broad and does not discriminate between various types of community laws. I argue that while it will be appropriate to subject the founding treaty to such a national procedure, there is no reason why some pre-agreed types of laws emanating from duly constituted institutions under the treaty and following the correct laid-down legislative procedure should not be immediately or directly applicable in national legal systems which have already given legal effect to the treaty – the foundation of the subsequent community law. This is an approach worth exploring by Africa's regional economic integration organisations to overcome the perennial problem of states not giving (or delaying in giving) effect to community laws.

Delay in giving effect to community law is only one of the disadvantages of relying on national constitutional procedures for law translation. As noted above, the very facts of incorporating community law into national legal systems and its concomitant subjection to national rules on resolving conflict of laws, may affect the effectiveness of community law. A provision like Article 39(2) of the Protocol on the establishment of the East African Customs Union to the effect that 'the customs law of the Community shall apply uniformly in the Customs Union except as otherwise provided for in this Protocol' is unlikely to be effective where a conflict between an

^[20] Article 12(1): 'Regulations shall be published in the Official Gazette of the Common Market and shall enter into force on the date of their publication or such later date as may be specified in the Regulations'.

^[21] See COMESA Treaty, Article 5(2)(b); EAC Treaty, Article 8(2)(b); ECOWAS Treaty, Article 5(2).

^[22] While Article 249 of the EC Treaty provides that 'a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States', Article 10(2) of the COMESA Treaty provides that 'a regulation shall be binding on all the Member States in its entirety'. The other paragraphs in the two articles on directives, decisions, recommendations and opinions are similarly worded.

‘incorporated customs law’ and a national law is resolved using the *lex posterior derogate priori* rule.^[23] Happily, the EAC Treaty provides for the principle of supremacy of the laws of the community.^[24] The principle may be applied to prioritise an ‘incorporated customs law’ which conflicts with a national law.

2.1.3 The principle of direct effect of community law

Direct effect of community law enables individuals to invoke community law before national courts.^[25] It allows national courts to use community law as an independent, direct and autonomous basis of decisions. It turns national courts and persons who litigate before them into private enforcers of community law. It brings ‘home’ to persons rights created by the community.

Direct effect should be distinguished from direct applicability. Direct applicability deals with the processes or means by which community law becomes part of national legal systems. Direct effect determines whether community law creates enforceable rights within national legal systems. Thus, although all directly effective laws can be considered as part of national legal systems, not all directly applicable laws are directly effective. A directly applicable law may be so vague, ambiguous, conditional, or so targeted at a particular group or issue that an enforceable right cannot be founded on it. This does not mean that such a law is useless in national legal systems; it may, for example, inform a court’s interpretation of another national law.

The COMESA, EAC and ECOWAS treaties are silent on the issue of whether they (or laws generated under them) are directly effective. This is so notwithstanding the fact that they all envisage a role for individuals in the integration process. An example of this is their provision for a preliminary reference procedure, which allows national courts to refer questions of community law to community courts for answers.^[26] Implicit in this is an assumption that issues of community law can be raised before national courts through means which include the direct invocation of the community law by individuals.

^[23] See also SADC Treaty, Article 6(4) which provides that ‘member states shall take all steps necessary to ensure the uniform application of this Treaty’.

^[24] See EAC Treaty, Article 8(4).

^[25] See generally Craig (1992).

^[26] See COMESA Treaty, Article 30, Protocol of the Economic Community of West African States Community Court of Justice (as amended), Article 10(f); EAC Treaty, Article 34, Protocol to the Southern African Development Community Tribunal and Rules Thereof, Article 16.

To date, the jurisprudence of the COMESA, EAC and ECOWAS courts of justice has not dealt with the issue of direct effect of community laws. However, unlike in other trade arrangements, the principle of direct effect is not explicitly denied.^[29] Accordingly, there is room for a teleological interpretation of the community treaties, which is informed by a vision to facilitate law translation to make the principle of direct effect part of the communities' legal system.^[30] It is also possible for states to legislate that a cause of action can be directly based on community law. An example of this is the Uganda Law Reform Commission's proposed WTO (Implementation) Agreement Bill.^[31] Article 12 of the bill allows for private actions on WTO agreements with the consent of the Attorney General.^[32]

2.2 Protecting translated community law

Regional economic communities have an interest in ensuring and facilitating law translation. This interest should be matched by principles aimed at protecting translated laws from inimical treatment which may render them ineffective within national legal systems. As noted above, the ECOWAS, COMESA and EAC treaties have adopted a less effective but perhaps politically expedient means for translating community laws into national legal systems, that is, the reliance on national constitutional procedures instead of the principle of direct applicability. They are also silent on the issue of direct effect of community law, and, accordingly, have rendered uncertain the issue of whether individuals can invoke community law before national courts.

On the other hand, the treaties are endowed with principles or procedures that one can characterise as aimed at protecting translated community laws from the vagaries of national legal systems. The principle of supremacy of community law, which is enshrined in Article 8(4) of the EAC Treaty ensures that conflicts between community law and national law are resolved in favour of the former. The principle of supremacy

^[29] See e.g. North American Free Trade Agreement, Article 2021. It explicitly prohibits state parties from allowing any private right of action under the treaty in national courts. It provides that 'no Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement'. In Panel's Report-US-Section 301-310 of the Trade Act of 1974, WT/DS/152, 7.72, it was held that 'neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect'.

^[30] It is worth remembering that, like the COMESA, ECOWAS and EAC treaties, the EC Treaty, 1957, was also silent on the issue of direct effect. It was through the jurisprudence of the European Court of Justice in the celebrated case of *Van Gend en Loos* (1963) that the principle became part of EC law.

^[32] Compare Canada: World Trade Organisation Agreement Implementation Act 1994, Section 5 & 6.

assumes that conflicts can arise between national law and community law before national courts. The preliminary reference procedure^[34] ensures that questions of community law arising in national legal systems are ultimately and authoritatively decided at the community level. Through this, the interests of the community are protected and inimical and conflicting national interpretations are avoided.

The preliminary reference procedure also serves as a means for diffusing into national legal systems a uniform understanding of community law. The direct access that legal and natural persons have to community courts^[35] ensures that breaches of community law occurring within national legal systems are brought to the communities' attention for remedy, even in cases where such breaches might have escaped the attention of the community.

The presence of these protective principles and procedures could be useful when the community courts of justice ultimately approach the issue of law translation. It can be argued that these instruments envision a stronger place for community law in national legal systems than the treaties *prima facie* suggest. With the active involvement and cooperation of national courts such a vision can be realised.

3. National constitutions, jurisprudence and law translation

3.1 Community law and national constitutions

The place of community law in national legal systems is greatly influenced by national constitutions^[36] and the judicial philosophy on the relations between international and national law.^[37] Because states are sovereign, giving effect to or enforcing a law emanating from another legal system should often have the express or tacit approval of the state. Where the courts enforce or use foreign laws without this approval, they are accused of inappropriate judicial activism and of blurring the lines between executive, judicial and legislative functions.

^[34] See COMESA Treaty, Article 30; Protocol of the Economic Community of West African States Community Court of Justice (as amended), Article 10(f); EAC Treaty, Article 34; Protocol to the Southern African Development Community Tribunal and Rules Thereof, Article 16.

^[35] See e.g. COMESA Treaty, Article 26; Southern African Development Community Protocol on Tribunal and Rules of Procedure Thereof, Article 15(1)(2); EAC Treaty, Article 30; Protocol of the Economic Community of West African States Community Court of Justice (as amended), Article 10.

^[36] See generally Hilf (1993).

^[37] This does not discount the importance of non-legal factors such as the political climate of the country. For example, post-Apartheid South Africa has shed its hostility towards international law and has become more international-law friendly as reflected in Articles 231–233 of its constitution.

An examination of how African constitutions are engineered to receive community laws should begin with the extent to which they acknowledge the communities' existence. In some constitutions, there are passing references to the communities' existence (here one should include the Organisation of African Unity, now African Union) and a constitutional commitment to abide by their principles or work towards achieving their goals. For example, Article 40 of the Constitution of the Republic of Ghana provides: 'In its dealing with other nations, the Government shall adhere to the principles enshrined in or as the case may be, the aims and ideals of (ii) the Charter of the Organisation of African Unity; ...(iv) the Treaty of the Economic Community of West African States'.^[38]

Other constitutions make reference to foreign policy objectives such as 'promoting sub-regional, regional and inter-African cooperation and unity' (Sierra Leone Constitution 1991, Art. 10(b)), 'promotion of African integration and support for African unity' (Nigeria Constitution 1999, Art. 19(b)), and 'respect for international law and treaty obligations' (Namibia Constitution 1990, Art. 96(d)).

Although these provisions are very superficial, they are useful. They demonstrate sensitivity to the existence and ideals of African economic integration processes. However, as channels for integrating community law into national legal systems they are of limited use. They mainly relate to the conduct of inter-state relations. This is reflected in the fact that they are often part of the 'foreign policy' provisions of the constitutions. They do not purport to make community law part of the national law. It will take a great deal of difficult legal arguments and judicial imagination for effect to be given to community law on their basis. However, courts can have regard to them in the interpretation and enforcement of national law vis-à-vis community law.

The above acknowledgements of the communities' existence and their objectives are therefore important. But, even more salient is the constitutions' vision of the relations between national and international law. This vision directly affects the place of community law in national legal systems. Traditionally, the relations between national and international law is discussed from the monist-dualist perspectives.^[42] Monism

^[38] See also Constitution of the Kingdom of Swaziland, 2005, Article 236(1)(d) which provides that 'in its dealing with other nations, Swaziland shall ... (d) endeavour to uphold the principles, aims and ideals of ... the African Union, the Southern African Development Community...'

^[42] See generally Brownlie (2003:31-53); Aust (2007:178-199).

has its root in natural law theories which see all law as the product of reason. It envisions international law to automatically be part of national legal systems and suggest that no conflict can arise between international and national law because they derive from the same source. The foundation of dualism is in legal positivism. It posits that international and national laws operate on separate legal planes: international law governs relations between states, and national law governs relations between individuals and the state. Under dualism, international law can play no role in the national legal systems except in so far as it has been received or adopted by them. The monism-dualist paradigm has been a target for trenchant academic criticism, but it is still useful for understanding how national legal systems approach international law, especially treaties.

Current constitutional arrangements in Africa reflect both approaches to international law. The former British colonies adhere to dualism; international law does not become part of or have the force of law in national legal systems unless it has been expressly given that force by a national measure, usually an act of parliament.^[43] The former French colonies adhere to monism. Their provisions are modelled on Article 55 of the French Constitution of 1958. In general, they provide that treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of domestic legislation, subject, for each agreement or treaty, to application by the other party'.^[44] This provision gives the force of law to international law and determines its status within the national hierarchy of laws. Under this provision, as soon as an international treaty or agreement is ratified or approved it has precedence over national laws, subject to implementation by the other parties to the treaty or agreement. The international treaty becomes applicable as law in the national legal system as soon as it is ratified. It may be invoked directly in national courts.

^[43] See e.g. Constitution of the Republic of Ghana, Article 75; Constitution of the Republic of South Africa, Article 231; Constitution of the Republic of Malawi, Article 211; Constitution of the Republic of Uganda, Article 123; Constitution of the Federal Republic of Nigeria, Article 12; Constitution of the Republic of Zimbabwe, Article 111B; Constitution of the Kingdom of Swaziland, Article 238(4).

^[44] See e.g. Constitution of Burkina Faso, Article 151; Constitution of Cameroon, Article 45; Constitution of Mali, Article 116; Constitution of the Republic of Benin, Article 147; Constitution of the Republic of Algeria, Article 132; Constitution of the Central African Republic, Article 72.

Although the above provision in the French colonies makes treaties superior to domestic legislation, there are conditions that must be satisfied for this to happen.^[45] First, the agreement has to be duly ratified or approved and published. Due ratification usually entails ensuring legislative and sometimes judicial intervention or participation before the treaty is ratified.^[46] This contrasts with the approach in the common law jurisdictions where the executive negotiates and concludes treaties that must subsequently be approved by the legislature. The judiciary has no role in the treaty making.^[47] The second requirement, which is reciprocity in the application of the treaty,^[48] also does not exist for the common law jurisdictions. Indeed, in economic integration, to make the domestic application of community law contingent on its reciprocal application by another state is inimical to the coherent development of the community legal system.^[49]

The reception of community law into national legal systems, especially in the dualist countries, still leaves unanswered the question of its status in the legal system. What is the place of community law in a national legal system's hierarchy of laws? Will community law trump national law in case of conflict? And will all national courts have jurisdiction to adjudicate matters in which community law or the community is engaged?^[50] These are weighty issues and one must look at national constitutions for answers.

A feature of many African constitutions is provisions which self-proclaim the constitutions as the supreme law of the land. Article 1(2) of the Constitution of the Republic of Ghana captures this. It provides that 'this Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision

^[45] See generally Kronenberger (2000).

^[46] See e.g. Article 82(8) of the Constitution of Republic of Madagascar, which provides that 'prior to any ratification, treaties shall be submitted by the President of the Republic to the Constitutional Court. In case of non-conformity with the Constitution, ratification may take place only after constitutional revision'. In Madagascar Constitutional Court (2007), the court held that the SADC protocol against corruption did not contain any provision that is contrary to the constitution.

^[47] See e.g. Constitution of the Republic of Ghana, Article 75 and Constitution of the Republic of South Africa Constitution, Article 231.

^[48] For a critique of the reciprocity requirement, see Cassese (1985:405-408).

^[49] In this respect, it is significant that one of the principal arguments used for denying direct effect to WTO law is that other countries do not provide for direct effect of WTO law. See Eisenberg (1993-94:127) and Schlemmer (2004:125)

^[50] An interesting provision in the treaties on this is to the effect that 'disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts'. See EAC Treaty, Article 33(1); COMESA Treaty, Article 29(1). The ECOWAS Treaty does not contain a similar provision.

of this Constitution shall, to the extent of the inconsistency, be void’.^[51] Others are less flamboyant, and shy away from spelling out the consequence of the constitution being supreme. For example, Article 1(6) of the Constitution of the Republic of Namibia tersely provides that ‘this Constitution shall be the Supreme Law of Namibia’. Whatever the phraseology adopted, the import is the same: the constitution is the *grundnorm* of the national legal system from which all laws derive their legal validity.

The accommodation of community law within national legal systems demands that the *grundnorm* recognises community law. Also, the *grundnorm* should, in some instance, allow itself or a national law to be displaced by community law. This may be politically unpalatable. It amounts to a surrender of sovereignty, a key component of statehood. However, unbridled adherence to sovereignty may be an obstacle to an effective economic integration process. In this respect, it is noteworthy that in the preamble to the ECOWAS Treaty, member states were ‘convinced that the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will’.

What is significant from the above exposition is that, so far, it appears that African governments have not appreciated the fact that economic integration makes constitutional demands and, on some issues, requires a rethink or amendment of constitutional or legislative provisions to accommodate community law and the community itself.^[52] The fact that there appears to be no national legislation to address the many challenges created by economic integration is testament to the lack of appreciation of the legal demands for successful integration. Perhaps, the slow pace at which the economic integration processes are moving has rendered the constitutional demands not immediate. It is open to question whether it is the lack of national legislation on community issues that is slowing down the integration process,

^[51] See also Constitution of the Republic of Malawi, Article 5; Constitution of the Republic of Sierra Leone, Article 171(15); Constitution of the Republic of South Africa, Article 2; Constitution of the Republic of Liberia, Article 2; Constitution of the Federal Republic of Nigeria, Article 1(3); Constitution of the Republic of Gambia, Article 4; Constitution of the Republic of Zambia, Article 1(2); Constitution of Republic of Kenya, Article 3; Constitution of the Republic of Uganda, Article 2(2); Constitution of the Republic of Tanzania, Article 64(5); Constitution of the Republic of Zimbabwe, Article 3; Constitution of the Republic of Lesotho, Article 2; Constitution of the Kingdom of Swaziland, Article 2(1).

^[52] See generally Southern African Development Community Protocol on Immunities and Privileges.

or the slow pace of integration that has led to the absence of national legislation. Whatever the case, it is obvious that a disjunction exists between community and national legal systems in Africa's economic integration processes. This needs immediate attention.

Comparatively, it is worth noting that some European countries have effected significant constitutional amendments in response to the legal demands of European integration.^[53] An example is Article 148 of the Constitution of Romania, a new member of the European Union. It provides:

(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two-thirds of the number of deputies and senators.

(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

(3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.

(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of Paragraph (2) are implemented.

(5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.

^[53] See e.g. Belgium Constitution, Article 34; Luxembourg Constitution, Article 49bis, Netherlands Constitution, Article 92–94. United Kingdom, European Communities Act 1972; Constitution of Poland, Article 91(3).

Presently, this level of constitutional accommodation, which definitely facilitates law translation, has no parallel in African constitutions. Admittedly, the stage of development of the European Community makes demands on national legal systems very different from those which may be the case at this stage of Africa's integration processes. But, it is undeniable that Africa's constitutions have remained largely ambivalent towards community law.

Historically, some countries did have constitutional provisions which aimed at strengthening Africa's integration. The immediate post-independence constitutions were imbued with preambles that extolled the virtues of African unity and Africans uniting. They contained specific and legally binding provisions that envisaged the ultimate surrender of national sovereignty to aid African unity. For example, Article 13 of the 1960 Constitution of the Republic of Ghana provided that 'the independence of Ghana should not be surrendered or diminished on any ground other than the furtherance of African unity'. In Article 2, the people of Ghana 'in the confident expectation of an early surrender of sovereignty to a union of African states and territories' conferred on parliament 'the power to provide for the surrender of the whole or any part of the sovereignty of Ghana'. Article 34 of the 1958 Constitution of the Republic of Guinea had earlier provided that 'the Republic may conclude with any African State agreements providing for association or the establishment of a community and involving partial or total relinquishment of Sovereignty with a view to the achievement of African Unity'. Similar provisions in other countries have been chronicled by Schwelb (1960:640-642). The speed with which the Organisation of African Unity (OAU) was formed is a testament to the importance of these constitutional provisions which encapsulated a national consciousness favourable to uniting Africa.

It is ironic that against the background of these provisions, when the Charter of the Organisation of African Unity came to be drafted and the organisation formed in 1963, 'sovereign equality of all Member States', 'non-interference in the internal affairs of States' and 'respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence' were entrenched as cardinal guiding (ultimately, debilitating) principles of the OAU (OAU Charter, Art. III(1)(2)(3)). The OAU never purported to be an economic integration organisation or at least did

not set out a clear economic integration agenda. Accordingly, the effect the post-independence constitutional provisions could have had on economic integration and especially on the issue of law translation remains uncertain.

What is certain is that these constitutional provisions did not make their way into subsequent constitutional revisions in the respective states. However, a few of such provisions still exist.^[56] The fact that they have largely disappeared from the constitutions says a lot about national legal commitment to Africa's economic integration processes. Significantly, most of the current constitutions, which pay very little attention to the legal demands of economic integration, were promulgated after the signing of the Treaty establishing the African Economic Community in 1991. The treaty envisages an integrated economic area covering all of Africa. The objectives of the treaty include the promotion of economic development and the integration of African economies in order to increase self-sufficiency, the promotion of endogenous and self-sustained development, and the fostering of the gradual establishment of the African Economic Community through coordination and harmonisation among existing and future regional economic communities.

3.2 National constitutions in the community treaties

Community law interacts with national constitutions on various issues. Through a number of provisions, community treaties acknowledge the existence of national constitutions, adopt conclusion legitimised by national constitutions or utilise their procedures for the implementation of community law.^[58] As noted above, an area where this is visible is in giving effect to treaties or other community laws. Under Article 5(2) of the ECOWAS Treaty, 'each Member State shall, in accordance with its

^[56] See e.g. Constitution of the Central African Republic, Article 70. It provides that 'the Republic may, after referendum, conclude agreements with any African States association or merger agreements, including partial or total abandonment of sovereignty in view of realising African unity'. A similar provision is contained in Article 146 of the Constitution of the Republic of Burkina Faso. See also Constitution of the Republic of Gambia, Article 79(2). It provides that 'The Gambia shall not – (a) enter into any engagement with any other country which causes it to lose its sovereignty without the matter first being put to a referendum and passed by such majority as may be prescribed by an Act of the National assembly; (b) become a member of any international organisation unless the National Assembly is satisfied that it is in the interest of The Gambia and that membership does not derogate from its sovereignty'.

^[58] In one provision, the community treaty seems to dictate to national constitutions. Article 145 of the EAC Treaty provides that 'a Partner State may withdraw from the Community provided: (a) the National Assembly of the Partner State so resolves by resolution supported by not less than a two-thirds majority of all the members entitled to vote'. Member states of the EAC have their own constitutional provisions which dictate the number of votes needed on any particular issue.

constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty'. Although the COMESA (Art. 5(2)) and EAC (Art. 8(2)) treaties do not make reference to constitutional procedures, this can be implied into them.

Community institutions also draw on institutions established by national constitutions for their makeup. The composition of the Assembly of Heads of State and Government, council of ministers and community parliaments is contingent on national institutions. Indeed, Article 1 of the EAC Treaty defines Head of State and Head of Government as 'a person designated as such by a Partner State's Constitution'. Similarly, under Article 50(2)(b), a person shall be qualified to be elected a member of the Assembly of the EAC by the National Assembly of a Partner State if such a person is, among others, 'qualified to be elected a member of the National Assembly of that Partner State under its Constitution'.

Another area of interaction is in the fact that community treaty provisions sometimes reflect values already entrenched in national constitutions. This is so on human rights, the rule of law and democracy. At first sight, this may appear superfluous as these values are already entrenched, at least on paper, at the national level. However, that is not so. Through this reflection, community law becomes an added layer of legality by which the conduct of national governments may be judged. This becomes important in instances where national governments violate of their own constitutional values. In the Ugandan case of *Katabazi v Attorney General of Uganda* (2007), the applicants, who were being tried for treason, were granted bail by the High Court of Uganda. However, armed security agents surrounded the court premises and prevented the execution of the bail. They rearrested the applicants, reincarcerated and recharged them before a Court Martial. They were not released even after the Constitutional Court of Uganda so ordered. This conduct was held to be a violation of the rule of law enshrined in Article 6(d) of the EAC Treaty.^[61] It is

^[61] It provides that the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include: good governance including adherence to the principles of democracy; the rule of law; accountability; transparency; social justice; equal opportunities; gender equality; as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights.

worth remembering that the Constitution of the Republic of Uganda (Ch. 4) contains a bill of rights. More recently, the Southern African Development Community Tribunal in *Mike Campbell (Pvt) Ltd and others v The Republic of Zimbabwe* (2008) found Zimbabwe to be in breach of its commitment to respect human rights, democracy and the rule of law in Article 4(c) of the SADC Treaty. At issue in the case was the state's acquisition of lands belonging to the applicants.

From the above, it is evident that the relations between community law and national constitutions go beyond giving effect to community law at the national level or resolving conflicts between community and national law (Wouters 2000:25-27). Community law can influence national constitutional values on issues such as democracy, the rule of law and human rights. The community treaties contain provisions stipulating democracy, respect for the rule of law and human rights as guiding principles.^[64] These principles can inform constitution making and interpretation at the national level. Indeed, as one writer (Adewoy 1997) has observed, there is a strong positive correlation between constitutionalism at the national level and the effectiveness of regional economic integration processes. The community treaty provisions can also be useful in adjudicating at the community level the legality of conduct at the national level. In sum, community law can provide constitutional guidance at the national level.

3.3 Community law and national judicial philosophy

National courts are an important institution in economic integration.^[66] Equally important is the judicial philosophy that informs their decisions in cases involving community issues. Judicial philosophy has a direct impact on the place of community law in national legal systems. This is especially so in instances where community law has not been incorporated into national law nor is directly applicable in national legal systems.

Judicial philosophy that is attuned to the goals and demands of economic integration, and is sensitive to national constitutional limits on the exercise of judicial power, especially on issues of foreign policy, is important for ensuring the effectiveness of

^[64] See e.g. ECOWAS Treaty, Article 4(g)(j); EAC Treaty, Article 3(3)(b), 6(d), 7(2); COMESA Treaty, Article 6(e)(g)(h).

^[66] See generally Mann (1972).

community law in national legal systems. Judicial philosophy which takes account of the goals of economic integration can be relevant in courts' approach to the principle of consistent interpretation, general reliance on laws emanating from other states, the taking of judicial notice, and the application of the rules on proof of foreign law. These can be utilised to enhance the place of community law in national legal systems.

We noted above that in many African legal systems an executive or parliamentary measure is required for international law to have the force of law. However, it is legally possible for national courts to give effect to a treaty, and hence community law, even though it has not been incorporated into national law. This possibility is visible in human rights law. In a number of cases, courts have relied on human rights treaties, even when they had not been incorporated into national law.

In *Unity Dow v Attorney General* (1991), the Botswana court's interpretation of a statute was 'strengthened' by the fact that Botswana was a signatory to the OAU Convention on Non-Discrimination even though Botswana had not ratified it – a fact which the judge expressly acknowledged. On appeal, the Attorney General specifically took issue with the court's reliance on unincorporated treaties, but the Court of Appeal affirmed the trial court's use of unincorporated treaties.^[68] It held that even if treaties and conventions do not confer enforceable rights on individuals within the state until parliament gave them the force of law, they could still be used as aids to construction. In Ghana, Justice Archer in *New Patriotic Party v Inspector General of Police* (1993-94:466)^[69] held that the fact that Ghana had not passed specific legislation to give effect to the African Charter on Human and People's Rights did not mean it could not be relied upon in adjudication.^[70] In Kenya, the Court of Appeal has also held that even though Kenya subscribes to the common law view that

^[68] *Dow v Attorney General* (1996:159-162). In this case, the applicant challenged the constitutionality of provisions of the Citizenship Act of 1984 as being discriminatory and an infringement on her constitutional rights and freedoms. These provisions, in essence, denied citizenship to children born to female citizens of Botswana who were married to foreign men.

^[69] Compare *Chihana v Republic* (1992) where the Malawi Supreme Court held that the United Nations Universal Declaration of Human Rights is part of the law of Malawi, but the African Charter on Human and People's Rights is not, and added, 'Malawi may well be a signatory to the Charter and as such is expected to respect the provisions of the Charter but until Malawi takes legislative measures to adopt it, the Charter is not part of the municipal law of Malawi and we doubt whether in the absence of any local statute incorporating its provision the Charter would be enforceable in our Courts'.

^[70] See Botha & Olivier (2004) for other cases in South Africa where courts have relied on various unincorporated treaties in adjudication. In these cases, unlike the Ghana and Botswana cases, the reliance had a constitutional foundation. South African courts are constitutionally mandated to consider international law in adjudication.

international law is only part of domestic law where it has been specifically incorporated, current thinking on the common law theory is that both international customary law and treaty law can be *applied* by courts where there is no conflict with existing state law, even in the absence of an implementing legislation.^[71]

Judicial philosophy that enables effect to be given to unincorporated treaties has also been felt in the non-human rights contexts. In Ghana, Justice Ocran was influenced in *Products (GH) Ltd. v Delmas America Africa Line Inc* (2004) by the United Nations Convention on the Carriage of Goods by Sea. He found Article 5 on the liability of carriers ‘highly relevant’ although at the time, the convention had not been incorporated into Ghana law. In South Africa, the Supreme Court of Appeal in *De Gree v Webb* (2007) was influenced by the principles of the Hague Convention on the Protection of Children and Cooperation in respect of Inter-Country Adoption which, although ratified by South Africa, had not been implemented domestically at the time.^[73] Similarly, in *Roger Parry v Astral Operations Ltd* (2005), the South African Labour Court was prepared to be ‘guided by’ Article 6 of the European Community’s Rome Convention on the Law Applicable to Contractual Obligation.^[75] It is suggested that similar treatment can be afforded to community laws in disputes in which they may be relevant.

Aside from promoting interpretations that may enhance the effectiveness of community law, judicial philosophy may allow rights to be conferred on individuals under the doctrine of legitimate expectation. In *Abacha v Fawehinmi* (2000),^[76] the Nigerian Supreme Court accepted that an unincorporated treaty might give rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty.^[77] But, in the Zimbabwean case of *Movement for*

^[71] *Rono v Rono* (2005:550). This principle was affirmed in *Kenya Airways Corporation v Tobias Oganya Auma* (2007).

^[73] See also *K v K* (1999: 691) on the application of the Hague Abduction Convention at a time when it had not been incorporated into South Africa law.

^[75] The court noted that South Africa was not bound by the Convention. However, it is relevant to consider the convention since Article 39(1) of the South African Constitution mandates the consideration of international law in the determination of cases.

^[76] In the *Abacha* case the respondent sought a declaration that his arrest and detention without charge contravened provisions of the 1979 Constitution of Nigeria and the African Charter of Human and People’s Rights (Ratification and Enforcement) Act of 1983.

^[77] *Ogundare JSC* (Par. 2-13) delivering the lead judgment, and *Achike JSC* cited with approval the Privacy Council opinion in *Higgs v. Minister of National Security* (2000:1375) to the effect that an unincorporated treaty ‘...may have an indirect effect upon the construction of statutes... Or *may give rise to a legitimate expectation* on the part of the citizens that the government, in its acts affecting

Democratic Change v The President of the Republic of Zimbabwe (2007), the court rejected this possibility. It held that the Southern African Development Community Principles and Guidelines on the Holding of Democratic Elections, approved by the Zimbabwean Government, was not a direct source of rights and obligations under Zimbabwean law. In the court's view, the signing of the agreement by the government indicated to the national and to the international community that the government ascribed to the minimum standards set out in the guidelines. But, it did not give the applicant or any other citizen of Zimbabwe a cause of action that was enforceable in a domestic law court based on the guidelines.

From the above, it can be argued that besides instances where community law has been directly incorporated into national law or made a source of domestic law^[79] the doctrine of legitimate expectation, the rule that national legislation should be interpreted in a manner consistent with the international law and a general judicial philosophy that allows courts to be guided by norms external to the legal system may be used to give effect to community law. In other words, judicial philosophy can provide an avenue through which unincorporated community laws can be given effect in national legal systems. This will be advantageous to the community, individuals and, indeed, government officials. For example, an administrative decision founded on international law is more likely to withstand judicial scrutiny than one which is not (*Chairman, Board of Trade and Tariffs v Branco* (2001:528-529)).

It remains to be seen whether African courts, through their jurisprudence, will accommodate community law. Indeed, there have been a few cases in which reliance has been placed on the objects or goals of the communities. For example, in *R v Obert Sithembiso Chikane* (2003), the Swaziland court held that 'in cases where cross-border criminals are convicted, the Courts must express the displeasure of the Southern African Development Community that serious cross-border crime shall not be tolerated'. In *Shah v Manurama Ltd* (2003), the Uganda court held that in East Africa there could no longer be an automatic and inflexible presumption for the courts to order security for costs against a plaintiff resident in the East African Community.

them, would observe the terms of the treaty', and added that this 'represents the correct position of the law, not only in England but in Nigeria as well'. [Emphasis added].

^[79] See Proposed New Constitution of Kenya, Article 3, which listed the laws of the East African Community as part of the laws of Kenya. But for the rejection of this constitution in a referendum in November 2005, this provision would have transformed the place of EAC law in Kenya's legal system.

Judicial reliance on the goals of regional communities when deciding cases is important at the present stage of the communities' development. By paying attention to the goals, courts can fashion remedies or produce judgments that ultimately strengthen economic integration. Areas where this could be useful include the enforcement of judgments from other African countries, national restrictions on cross-border commerce, rights of migrant workers and treatment of assets of migrants.

There have been other instances where courts paid attention to substantive community laws. In *Friday Anderson Jumbe v Humphrey Chimpando* (2005), the Malawian court relied on the Southern African Development Protocol against Corruption for guidance on principles relating to corruption. In *Chloride Batteries Limited v Viscosity* (2006), the Malawian court took judicial notice of Article 55 of the COMESA Treaty which deals with the competition policy of member states in granting an injunction restraining the defendant from marketing alleged counterfeit batteries imported from Kenya, Malawi. In *Hoffman v South African Airways* (2001), the South African Constitutional Court referred to the 1997 Code of Conduct on HIV/AIDS and Employment in the Southern African Development Community. In the Lesotho case of *Molifi v Independent Electoral Commission* (2005), the male applicant challenged the constitutionality of legislation that designated particular electoral divisions, including the one in which he wanted to stand for elections for the local assembly as reserved for women candidates only. One of the international instruments the court found useful in rejecting the applicant's challenge was the 1997 SADC Declaration on Gender and Development.

In almost all of the above cases, the courts did not engage in depth with the community laws or goals that were used. However, the cases are important first steps. They demonstrate some level of awareness on the part of lawyers and judges of the existence and relevance of community law. It is hoped that with time this awareness will translate into more rigorous judicial and legal national engagement with community law. In furtherance of this, academics and institutions have a crucial role to play. They must sow the seeds of community law in the minds of future generations of lawyers and judges. This can be done through specific courses on regional integration in Africa or integrating relevant aspects of community law into

already existing courses such as international law and commercial law.^[87] Regional economic integration studies should not be confined to a few postgraduate students. The presence of a strong juristic group with interest in community law is perhaps the surest way of ensuring the effectiveness of community law in national legal systems.

Admittedly, in the absence of specific legislation giving effect to community law, the role judicial philosophy can play is limited. Its role will be constrained by constitutional law including the doctrine of separation of powers. The degree to which judges and lawyers are aware of community laws and are willing to deploy them in the dispute settlement process is equally important. Also, the role of judicial philosophy is contingent on litigation in which community law is engaged and legal arguments in which community issues are raised. Where there is a culture of settling disputes out of court or of not invoking community law in litigation, perhaps due to a lack of awareness, there is not much the judiciary can do.

A yet to be explored issue as regards the relations between national judiciaries and community law is the extent to which or the possibility that national courts can judicially review community law. For example, can the Supreme Court of The Gambia review the constitutionality of The Gambia's membership of ECOWAS on the ground that it amounts to a surrender of sovereignty and, hence, an infringement of Article 79(2) of the constitution? The ability of national judiciaries to review community law against national constitutions or other laws depends on their jurisdiction. In theory, the existing constitutions do not seem to exclude the possibility of such reviews. However, it is likely that the courts may avoid reviewing community law unless there is something flagrantly unconstitutional or in violation of their national law about it. Indeed, individual challenges to trade agreements before African national courts are rare, and the issue of judicial review of community law is unlikely to be an immediate issue for Africa's economic integration processes. However, the possibility of such review should make community law makers more attentive to national constitutional laws. This will avoid tensions between community laws and national laws.^[88]

^[87] It is significant here that European Union Law is a key component of the undergraduate law curriculum in EU countries.

^[88] An obvious illustration of this lack of attention is Rule 41(8)(b) of the Rules of the Court of Justice of the Common Market of Eastern and Southern Africa, 2003, which provides that a member state *shall*, at the instance of the court of justice, prosecute before its competent court a witness who violates an oath or affirmation the witness took before the court of justice. In some COMESA jurisdictions, the

4. Conclusion

This paper reveals a degree of ambivalence towards the issue of law translation within both community and national legal systems in Africa. The approaches of the community treaties to the issue have left uncertainties in their wake. Hopefully, in the not too distant future the interpretative jurisdiction of the community courts of justice will be called upon to clarify some of these uncertainties.

National legal systems have also largely shied away from this question – a state of affairs reflected in their constitutions and court jurisprudence. Indeed, it was suggested that in some instances current constitutional provisions may be inimical to law translation. At present, community law does not enjoy any preferred position within member states' legal systems. It is treated as any other international law. Community law's genesis in international law cannot be denied. However, it has been argued that the effectiveness of economic integration in Africa will sometimes demand a different approach to community law.

After many years of African regional economic integration processes, the above represents an unfortunate state of affairs. The disjunction between community and national legal systems, which results from the lack of attention to the issue of law translation, works against the effectiveness of economic integration. As these communities envision progression on the various stages of integration – free trade areas, customs unions, common markets and economic communities – it is hoped that they will become more attentive to the issue of law translation. The issue of law translation becomes increasingly more important as economic integration progresses. The communities have to provide a more robust and defined legal framework for law translation.

Similarly, national legal systems should analyse the challenges their laws and jurisprudence pose for law translation and, where necessary, effect amendments or legislate to overcome them. This task should be founded on member states' undertaking in the community treaties to create conditions favourable for the development and achievement of the goals of the communities and to abstain from

power to prosecute for a criminal offence is solely at the discretion of the Attorney General or Director of Public Prosecution. See e.g. Constitution of the Republic of Kenya, Article 26(3)(8) and Constitution of the Republic of Zambia, Article 56(6).

measures likely to jeopardise the achievement of the aims of the communities.^[89] National rules that work against the effectiveness of community law offend this undertaking.

Finally, it is suggested that a more systematic and rigorous academic study into the issues raised in this paper is needed to inform community and national legal systems in their approach to the issue of law translation, and to shape the future course of Africa's regional integration processes.

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^[89] COMESA Treaty, Article 5(1); EAC Treaty, Article 8(1)(a)(c); ECOWAS Treaty, Article 5(1).

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